IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 453 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHANJI MOTIBHAI HARJIBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 453 of 1992

MR MJ BUDDHBHATTI for Petitioner No. 1

MR SS PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 12/03/2003

ORAL JUDGEMENT

1. The appellant herein has challenged the judgment and order of conviction and sentence passed in Sessions Case No. 276 of 1989 against him by the Ld.

Addl. Sessions Judge (Vacation), Court No. 7, Ahmedabad City dated 22nd May, 1992. The appellant has been convicted for offence u/S. 366 of the Indian Penal Code (for short 'IPC') and he has been sentenced to suffer RI for two and half years and to pay fine of Rs.500/-, in default further RI for one month. He has also been convicted for committing offence u/S. 376 of the IPC and he has been sentenced to suffer RI for four years and to pay fine of Rs.500/-, in default further RI for two months. The sentences of the appellant are ordered to run concurrently.

2. The case of the prosecution in nutshell can be stated as under :-

2.1. The appellant was staying in slum quarters situated near Vira Bhagat Chawl in Bapunagar area in the city of Ahmedabad. Above the residence of the appellant, one Naranbhai Lalubhai was staying with his family in Block No. E/25 in the same building. Naranbhai's family consisted of his wife Nandaben, his son Mukesh, his elder daughter Lata and younger daughter Usha. It appears that Lata at that time was aged about 15 years as she was born on 5th November, 1974. The appellant and Lata developed sweet relations between them and they often met in the absence of their parents. On 4th March, 1989 the appellant called Lata on the terrace of the building taking the advantage of the absence of her parents who had gone to attend to their usual work as they were serving in the Sanitary Department of the Municipal Corporation. In response to the call given by the appellant, Lata went up and at that time the appellant told her that they should elope and get married. Lata immediately agreed to this proposal and she went home and collected her clothes and also Rs.50/= and joined the appellant. They initially went to Kankaria lake in a rickshaw and thereafter they went to the town hall and sat in the garden. From the evidence of Lata it appears that appellant at the relevant time was already engaged to sister of one Ramesh and that fact was revealed to Lata by him, but he had assured her that he would marry her as he did not like sister of Ramesh. It is the case of the prosecution that both Lata and the appellant went in the garden of town hall and during that time the appellant had sexual intercourse with her against her wish. In the evening at about 6.00 O'clock they left the garden and went to Thaltej area where the appellant contacted one Karshanbhai and requested him to make one room available to him. His request was acceded to by Karshanbhai and the appellant and Lata spent the night in that room. It is the case of the prosecution

that even at that time the appellant had sexual intercourse with her despite her protest. In the next morning at about 6.00 O'clock they left the room and while they were having tea in a road side restaurant, uncle of Lata noticed them and he apprehended them and took them to Bapunagar Police Station. After completing the initial formalities the police sent Lata to Civil Hospital for the physical examination. At the hospital she was examined by the Medical Officer and in the opinion of the Medical Officer Lata was habituated to have sexual intercourse and that she was fully grown up. She was kept for about four days in the hospital and then discharged.

2.2. The father of Lata, namely Naranbhai had already given complaint on 4th March, 1989 regarding kidnapping of Lata by the appellant and the same was registered at C.R. No. 52 of 1989 at Bapunagar Police Station. The appellant was immediately arrested in connection with the said offence. The police thereafter carried out further investigation and on completion of the same, submitted charge-sheet in the Court of Ld. Magistrate, who committed the case to the Court of Sessions since offence u/S. 376 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial the Ld. Sessions Judge framed charge at Exh. 1 against the appellant for committing offences u/S. 366 of the IPC and section 376 of the IPC. The charge is dated 16th October, 1989. The appellant pleaded not guilty to the charge and claimed to be tried.

3.1. At the trial the prosecution placed reliance on the oral evidence of 11 witnesses examined by it and also placed reliance on the documentary evidence such as the FIR, the medical certificates of the appellant as well as Lata, various panchnamas, etc. The further statement of the appellant was recorded u/S. 313 of the Code of Criminal Procedure and from the said statement it appears that the accused was around 18 years at the time when the offence took place. In the further statement no specific defence has been taken and his defence appears to be that of general denial.

4. At the conclusion of the trial, the Ld. Addl. Sessions Judge convicted the appellant and sentenced him to suffer imprisonment as stated above. It is this judgment and order of conviction and sentence that have been challenged before this Court.

5. Mr. M.J. Budhdhbhatti, learned advocate for the appellant has fairly not challenged the conviction of the appellant u/Ss. 366 and 376 of the IPC. However, he has addressed the Court on the question of sentence and has submitted that looking to the circumstances prevailing then, the sentence imposed by the trial Court is very harsh and some leniency is required to be shown to the appellant.

5.1. As against that, Mr. S.S. Patel, Ld. APP appearing for the respondent - State has submitted that considering the fact that Lata was a minor girl of 15 years at the time when the offence was committed, no leniency can be shown to the appellant. He has supported the judgment and order of conviction and sentence passed by the trial Court.

6. With a view to reappreciate the evidence I have gone through the record and also have carefully considered the submissions made by the learned advocates for the appellant as well as for the respondent - State. It appears from the record that the appellant and the girl were staying in the same building. Both of them at the relevant time were in the age group of 15 to 20 years. It also appears from the record that there was teenage love affair between them. In this background the appellant on the day of offence had called the girl on the terrace and had proposed to her to go with him as he wanted to get married to her. The girl immediately accepted the proposal and without any hesitation she left the house with a pair of clothes and Rs.50/-. At that time both the parents of the girl were away on duty and there was no one in the house except her younger sister Usha. From the evidence of Lata as well as the medical evidence of Dr. Jitendra J. Mehta P.W. 1 Exh. 7 and the report of Forensic Science Laboratory, it appears that while the appellant and Lata were together, Lata was subjected to sexual intercourse by the appellant on two occasions. However, if the entire incident is appreciated in the background of the facts that both the appellant as well as Lata had eloped from their respective home and had stayed together for one day and one night, and their young age and the relations between them, this was bound to happen. Lata's evidence that she had protested does not appear to be acceptable. However, the fact remains that technically the appellant had committed offence made punishable u/S. 366 as he had enticed away a minor girl under 16 years of age from the lawful guardianship of her parents without their consent for the purpose of getting married to her and also for having sexual intercourse with her. Further considering

the fact that there is evidence to show that he had indulged into sexual intercourse with her, the offence u/S. 376 of the IPC is also committed by the appellant. But in the aforesaid background, namely that both the persons at the relevant time were teenagers and of immature age and since they were staying in the same building and had developed intimate relationship, the appellant cannot be visited with the punishment of four years and two and half years of rigorous imprisonment for offences u/S. 376 and u/S. 366 of IPC respectively. There is one more reason to take lenient view in the matter and that is almost 13 years have passed from the date of the offence; the record shows that the girl has already married and settled down in her life and so must have the appellant. If after thirteen years the appellant is required to go to jail, it will not only upset his settled life but it will also entail miserable consequences for his family members. In the facts of the case this is not warranted. It appears from the record that prior to his trial appellant had remained in custody from 6th March, 1989 to 3rd April, 1989. Thereafter he was released on bail. Subsequently, after his conviction, he was again taken into custody on 22nd May, 1992 and was released on bail by virtue of the order passed by this Court dated 27th May, 1992. Thus, it appears that the appellant has remained in custody for about one month and seven days. In my opinion, the ends of justice would be served if the appellant is awarded the imprisonment already undergone by him.

7. In the result, the appeal is partly allowed. The order of conviction recorded by the Ld. trial Judge on both the counts remains as it is. However, the sentence of imprisonment awarded by the Ld. trial Judge i.e. RI for two and half years for offence u/S. 366 of the IPC and RI for four years for offence u/S. 376 of the IPC is altered and it is reduced to the period of imprisonment already undergone by the appellant. The sentence of fine remains as it is. In view of this order, the appellant is now not required to surrender to the custody. At present the appellant is on bail and he has been directed to furnish fresh bonds. In view of that, the bail bonds are ordered to be cancelled.

[AKSHAY H. MEHTA, J.]

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